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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

TALK AMERICA INC.,

Petitioner,

v.

JOE DOUGLAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Whether the court of appeals erred by issuing a writ of mandamus striking down arbitration and class action waiver provisions in an arbitration agreement in direct violation of the Best Evidence Rule and by creating a new procedure for deciding "arbitrability" later in the litigation process while shifting the burden to the party seeking arbitration to prove an absence of unconscionability.

II. CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows:

Talk America Inc. is a wholly owned subsidiary of Talk America Holdings, Inc., itself a wholly owned subsidiary of Cavtel Holdings, LLC, which is in turn a wholly owned subsidiary of Cavalier Telephone Corporation. No publicly held corporation owns more than 10% of the stock of Talk America Inc.

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III. PETITION FOR WRIT OF CERTIORARI

Petitioner Talk America Inc. respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit decided July 18, 2007, which was denied review by the Ninth Circuit on August 29, 2007.

IV. OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit issued the Opinion on July 18, 2007, which may be found at 495 F.3d 1062 (9th Cir. 2007). (App. 1-11). The Court of Appeals' decision issued a writ of mandamus relating to an order entered by the United States District Court for the Central District of California, which is unreported. (App. 15-27).

V. STATEMENT OF JURISDICTION

The Court of Appeals' opinion was issued on July 18, 2007. On August 29, 2007, the Court of Appeals entered an order denying rehearing *en banc*. This petition is filed within ninety (90) days of that order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

VI. STATUTORY PROVISIONS INVOLVED

A. The Federal Arbitration Act, 9 U.S.C. §§ 2-4, 16

Except as otherwise provided in Section 1292(b) of Title 28, an appeal may not be taken from an interlocutory order

> (1) granting a stay of any action under section 3 of this title

9 U.S.C. § 16(b)

B. The All Writs Act, 28 U.S.C. § 1651(a)

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

C. Federal Rule of Evidence 1002

> "To prove the content of a writing . . . the original writing . . . is required, except as otherwise provided by these rules or Act of Congress."

VII. STATEMENT OF THE CASE

A. Introduction

Continuing California's long history of antagonism toward arbitration, the United States Court of Appeals for the Ninth Circuit granted a writ of

mandamus eliminating application of the Best Evidence Rule to arbitration contracts and authorizing a sophisticated businessman the right to avoid arbitration *literally* by merely declaring he *recalled* a different written agreement than the one before the district court containing an arbitration clause.

Plaintiff neither proffered the other alleged written agreement nor sought leave from the district court to locate and submit it. The district court properly interpreted the only written contract before it and ordered arbitration in accordance with its terms. Remarkably, the Ninth Circuit accepted Plaintiff's description of a prior alleged written agreement and vacated the order compelling arbitration finding without any basis in the record that *defendant* sought to "change the terms" of the written contract between the parties.

The Ninth Circuit's order is in direct conflict with other federal courts of appeal and contrary to well-established precedent in this Court on numerous grounds, including:

1. Improper Standard of Review

In contravention of the explicit statutory directive of Congress in 9 U.S.C. § 16(b) prohibiting appeals from interlocutory orders compelling arbitration, the Ninth Circuit issued a writ of mandamus on the ground the district court purportedly erred in applying California law by enforcing the only written contract before it and ordering arbitration in strict accordance with its

terms. The standard of review applied by the Ninth Circuit is in conflict with other courts of appeal, which require a petitioner to establish a "clear abuse of discretion," "clear and indisputable right" to mandamus relief or a showing the district court "clearly overstep[ped] its authority" before 9 U.S.C. § 16(b) can be ignored. *Steele v. L.F. Rothschild & Co., Inc.*, 864 F.2d 1 (2d Cir. 1988); *McDermott Int'l, Inc. v. Underwriters at Lloyds*, 981 F.2d 744, 748 (5th Cir. 1993). Unlike the Ninth Circuit, other courts of appeal properly hold an alleged misapplication of state law generally must be addressed by direct appeal and is an insufficient basis for granting extraordinary relief by mandamus. *Id.*

2. Special Treatment for Arbitration Agreement

Contrary to well-established precedent of this Court which prohibits lower courts from "invalidat[ing] arbitration agreements under state laws applicable only to arbitration provisions," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), the Ninth Circuit created a new evidentiary paradigm, including a new standard of review, procedure and burden of proof for proving formation of arbitration agreements, different than other contracts governed by California law. Unlike other contract claims in California, the Ninth Circuit vacated the district court's order compelling arbitration and accepted Plaintiff's recollection of the alleged terms of an undisclosed written agreement as the applicable contract between the parties in direct contravention of the Best Evidence Rule.

3. Delayed Arbitrability Determination

In direct conflict with this Court's instruction "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983), the Ninth Circuit created a new rule that determination of whether an arbitration clause should be enforced "depends on facts and circumstances developed during the course of litigation." (App. 8).

4. Appellate Court Findings of Fact

In contravention of basic black-letter law, the Ninth Circuit failed to recognize findings of fact made by the district court and improperly made its own findings of fact as an appellate court sitting in mandamus. The Ninth Circuit's action is contrary to the decision of this Court and every other known federal court of appeals addressing this issue. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) ("[T]he Court of Appeals was mistaken to engage in . . . factfinding."); *United States v. Griesa*, 481 F.2d 276, 278 n.2 (2d Cir. 1973) ("[S]upervisory mandamus is particularly ill-suited as a method of policing district court decisions that turn on issues of fact.").

5. Class Action Waiver – Split of Authority

Contrary to decisional law from at least four other federal courts of appeals (Third, Fourth, Fifth

and Eighth Circuits) and several state supreme courts,[1] but arguably in conformity with at least one other federal court of appeal and other state supreme courts,[2] the Ninth Circuit has refused to follow this Court's precedent in enforcing an arbitration agreement under 9 U.S.C. § 4 despite the parties' agreement to preclude class actions. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (noting an arbitration agreement may be enforced "even if the arbitration could not go forward as a class action . . . "). Panels of the United States Court of Appeals for the Eleventh Circuit have reached opposite conclusions on this issue.[3]

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[1] *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2004); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638-39 (4th Cir. 2002); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Walther v. Sovereign Bank*, 872 A.2d 735, 750 (Md. 2005); *Stenzel v. Dell, Inc.*, 870 A.2d 133 (Me. 2005) (Texas law); *Brown v. KFC National Management Co.*, 921 P.2d 146, 167 n.23 (Haw. 1996).

[2] *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1007-08 (Wash. 2007); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 271-74 (Ill. 2006); *Muhammad v. County Bank*, 912 A.2d 88, 100-02 (N.J. 2006).

[3] *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 2020, 164 L. Ed. 2d 779 (2006) (upholding arbitration provision with class action waiver); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 817-18 (11th Cir. 2001) (same); cf. *Dale v. Comcast Corp.*, 498 F.3d 1216, 1223-24 (11th Cir. 2007) (distinguishing *Caley*, striking down arbitration clause with class action waiver as unconscionable).

6. Improper Application of Mootness Doctrine

In direct conflict with decisional law of this Court, the Ninth Circuit improperly granted mandamus relief on the ground Douglas's "individual claim would be rendered moot" if he "[won] the arbitration and [was] awarded all the damages he asks for." (App. 9); *compare United States Parole Commission v. Geraghty*, 445 U.S. 388, 397-98 (1980) ("[A case or controversy] may exist . . . even though the claim of the named plaintiff has become moot."); *see also Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980).

7. *Prima Paint* Issue

Contrary to this Court's holding in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967), that a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator, the Ninth Circuit improperly granted mandamus relief striking down the arbitration clause based upon its conclusion that a *separate* contract provision, namely, the class action waiver clause, "may be" unconscionable under California law. (App. 8).

Talk America respectfully submits this Court should grant its petition for writ of certiorari and resolve the important questions presented by this appeal.

B. In General

1. Douglas's Background

Plaintiff Joe Douglas ("Douglas") is a sophisticated sports agent who represents famous sports figures, including Olympian Carl Lewis, in negotiations with companies such as Coca-Cola.

On August 11, 2006, Douglas brought an action against Talk America, a long distance telephone service provider, claiming breach of a "written" contract on grounds Talk America allegedly misled Douglas in connection with a telephone billing statement issued in August 2005 (ER0001).[4] In his First Amended Complaint, among other things, Douglas sought to serve as a representative for a national class of consumers (ER0005).

Contrary to Douglas's assertions, the telephone number identified in the First Amended Complaint is not used by him as a consumer but is the *commercial* facsimile number of one of Douglas's attorneys (ER0001 and ER0082). Indeed, the telephone number at issue is shown on the cover page of the First Amended Complaint under the name of Douglas's attorney, David Greifinger (ER0001) (facsimile number (310) 450-4715).

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[4] Pursuant to Supreme Court Rule 12.7, Talk America cites to the certified record.

2. Written Contract

In his First Amended Complaint, Douglas admits "[o]n or before July 18, 2005, [Douglas and Talk America] *entered into a written* telephone service contract" (ER0011) (emphasis added). Talk America submitted to the district court a "written telephone service contract" known as a Consumer Service Agreement ("CSA"), which included class action waiver, arbitration and choice-of-law provisions (ER0060-66). Pursuant to the terms of the CSA, an arbitration between Douglas and Talk America could be held for as little as $20.00 and could be conducted entirely online, by mail or at a location in California, Douglas's home state (ER0069-81).

After Talk America submitted the CSA to the district court, Douglas declared he did "not *recall* any class action waiver, arbitration or New York choice-of-law provisions" in the written contract with Talk America and that he allegedly had not "seen" the CSA (as opposed to knowing of its existence) (ER0121) (emphasis added). Douglas did not proffer any different written contract or seek leave to take discovery to locate and present a different written agreement to the district court.

Properly addressing the only written contract before it, the district court made factual findings that (a) "[Douglas] acknowledge[d] the existence of an agreement with Talk America"; and (b) Douglas "further acknowledge[d]" the CSA states that use of Talk America's service *alone* creates an agreement

with regard to the "terms" in the written telephone service agreement (ER0183) (emphasis added).

VIII. REASONS FOR GRANTING THE WRIT

A. Subjecting Arbitration Agreements to a Newly Created Exception to the Best Evidence Rule

Rule 1002 of the Federal Rules of Evidence provides, "[t]o prove the content of a writing . . . the original writing . . . is required, except as otherwise provided by these rules or Act of Congress." The Best Evidence Rule applies "when a witness seeks to testify about the contents of a writing . . . without producing the physical item itself." *United States. v. Bennett*, 363 F.3d 947, 953 (9th Cir. 2004). *See Railroad Management Co., L.L.C. v. CFS Louisiana Midstream Co.*, 428 F.3d 214 (5th Cir. 2005) (affirming an order excluding *testimony* as to the terms of a written contract as violative of Best Evidence Rule).

This Court has recognized under California law "the burden of justifying a departure from a contract's written terms generally rests with the party seeking the departure." *UNUM Life Ins. Co. of America v. Ward,* 526 U.S. 358, 371 (1999); *see also Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000). The party resisting arbitration bears the burden of showing the arbitration provision is invalid or does not encompass the claims at issue. *Id.*

In conformity with the Best Evidence Rule, the district court evaluated the only "written" contract

before it and rejected Douglas's unsupported recollection of the terms of an unknown and unsubstantiated contract not presented to the district court.

The Ninth Circuit's creation of an exception to applying the Best Evidence Rule to arbitration contracts stands in sharp contrast to this Court's admonition that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Doctor's Assocs.*, 517 U.S. at 687 (citations omitted).

The Ninth Circuit's abandonment of the Best Evidence Rule for arbitration agreements, respectfully, also makes poor policy. This approach runs counter to almost every modern policy pronouncement of this Court regarding enforcement of arbitration agreements and will only result in a slew of mandamus petitions being filed seeking to vacate arbitration orders on the basis of hypothetical written agreements manufactured in the minds of those seeking to avoid arbitration.

B. Delay of the Arbitrability Decision

The Ninth Circuit also improperly created a new standard and timetable for determining whether an arbitration provision is unconscionable by requiring the district court to delay such determination until after "the facts and circumstances [have] developed during the course of litigation." (App. 8). This new paradigm is directly contrary to the Court's recent decision in *Buckeye Check Cashing, Inc. v. Cardegna*,

rejecting an almost identical argument. 546 U.S. 440, 448-49 (2006) ("[I]t is equally true that respondents' approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. *Prima Paint* resolved this conundrum – and resolved it in favor of the separate enforceability of arbitration provisions.").

Here, the Ninth Circuit held that because a "class action waiver provision . . . *may be* unconscionable in California," the parties to such contracts no longer have the right to arbitrate their disputes until they proceed through the "course of litigation" to determine whether the clause is unconscionable. Such a procedure plainly runs afoul of this Court's clear instruction "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

C. Findings of Fact by the Ninth Circuit

The Ninth Circuit acting on its own initiative made a finding of fact that the terms of the written contract between Talk America and Douglas were "change[d]" (App. 1). The district court understandably made no such finding because there was no prior written contract presented by Douglas to the district court by which to evaluate any alleged "change." Misusing the office of mandamus, the Ninth Circuit overreached in making its own finding of fact on this critical issue.

The Ninth Circuit's statement of the issue as whether a service provider can "unilaterally *change* the terms of a contract . . . [without] the other party's consent" only highlights the Ninth Circuit's improper attempt to make findings of fact as to the existence and terms of a written contract not before the district court. There was only one written contract before the district court. The Ninth Circuit's comparison of the CSA to an undisclosed, hypothetical contract to determine whether any "change" occurred was clearly contrary to law.

As this Court has held in an analogous context,

> If the Court of Appeals believed that the District Court had failed to make findings of fact on this critical issue essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were 'clearly erroneous' within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own.

Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986).

The Ninth Circuit's attempt to make findings of fact relative to an alleged "change" in contract terms

when there was no evidence before the district court to support such a finding was clearly in error. Even more, the Ninth Circuit went far beyond the office of mandamus in vacating the district court's order when at a minimum there were issues of material fact in the record.[5]

D. Status of Douglas's Right To Obtain Review of the District Court's Decision After Arbitration

The Ninth Circuit granted mandamus relief because it found Douglas had "no other adequate means" of ensuring he could continue as a class representative and he would be "prejudiced in a way not correctable on appeal" because his "individual claim would be rendered moot" if he "[won] the arbitration and [was] awarded all the damages he asks for." (App. 9). The Ninth Circuit's opinion is in error and contrary to well-established decisional law of this Court.

In *United States Parole Commission v. Geraghty*, 445 U.S. 388, 397-98 (1980), this Court recognized

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[5] Based on Douglas's admission in his First Amended Complaint, the district court found a written agreement between Douglas and Talk America existed, but it properly did not – because it could not – address whether there was any "change" in the written contract because no such evidence was properly before the court. The district court considered whether Douglas had received a hard copy of the written agreement and properly found the issue was not controlling (ER0184). The Ninth Circuit sitting in mandamus had no authority to rewrite the district court's findings of fact.

that a case or controversy "may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." Similarly, the Court determined that a named representative retained a right to appeal a denial of class certification ruling even though his individual claims were satisfied. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980).

The Ninth Circuit's decision to grant mandamus relief to Douglas because he allegedly could "moot" his claim and lose the opportunity to continue as a class representative was in error. Douglas will lose no right to appeal the district court's order requiring him to arbitrate his individual claim even if his own claim is satisfied after arbitration.

Contrary to the decisions of other courts of appeal, the Ninth Circuit was in error for claiming Douglas was entitled to mandamus relief when any alleged error by the district court could be reviewed on direct appeal. *Compare Communication Workers of America, AFL-CIO v. American Tel. & Tel. Co.*, 932 F.2d 199, 213 (3d Cir. 1991) ("[T]hat AT & T may have to arbitrate before taking this appeal is not a basis for mandamus."); *McDermott Int'l, Inc. v. Underwriters at Lloyds*, 981 F.2d 744, 748 (5th Cir. 1993) ("[Mandamus] is particularly heavy, because Congress has expressly limited interlocutory review of a district court decision on arbitration.").

IX. CONCLUSION

This Court should grant Talk America's writ of certiorari for at least the following six reasons: (1) to resolve a dispute in the courts of appeal regarding the applicable standard of review for vacating orders compelling arbitration by writ of mandamus under the All Writs Act and Federal Arbitration Act; (2) to resolve a deep division in the courts of appeal and state supreme courts regarding enforcement of class action waiver provisions; (3) to reject the new pronouncement by the Ninth Circuit authorizing lower courts to revoke application of the Best Evidence Rule to arbitration agreements; (4) to reject the Ninth Circuit's new paradigm for determining arbitrability "during the course of litigation"; (5) to reinforce that claims of unconscionability beyond an arbitration clause alone are to be resolved by the arbitrator, not the court; and (6) to correct other misstatements of law by the Ninth Circuit, including its contention of mootness of a class action after arbitration as described herein.

For the reasons set forth above, Talk America respectfully requests this Court grant its petition for a writ of certiorari to review this important case.

Dated this 27th day of November, 2007.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE DOUGLAS, on behalf of himself and on behalf of all others similarly situated, Petitioner, v. **UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,** Respondent, **TALK AMERICA INC., a Pennsylvania corporation,** Real Party in Interest.	No. 06-75424 D.C. No. CV-06-03809-GAF **OPINION**

On Petition for Writ of Mandamus
to the United States District Court
for the Central District of California

Argued and Submitted June 7, 2007

(Filed Jul. 18, 2007)

Before: **KOZINSKI**, **GOULD** and **CALLAHAN**, Circuit Judges.

PER CURIAM:

We consider whether a service provider may change the terms of its service contract by merely posting a revised contract on its website.

Facts

Joe Douglas contracted for long distance telephone service with America Online. Talk America subsequently acquired this business from AOL and continued to provide telephone service to AOL's former customers. Talk America then added four provisions to the service contract: (1) additional service charges; (2) a class action waiver; (3) an arbitration clause; and (4) a choice-of-law provision pointing to New York law. Talk America posted the revised contract on its website but, according to Douglas, it never notified him that the contract had changed. Unaware of the new terms, Douglas continued using Talk America's services for four years.

After becoming aware of the additional charges, Douglas filed a class action lawsuit in district court, charging Talk America with violations of the Federal Communications Act, breach of contract and violations of various California consumer protection statutes. Talk America moved to compel arbitration based on the modified contract and the district court granted the motion. Because the Federal Arbitration Act, 9 U.S.C. § 16, does not authorize interlocutory appeals of a district court order compelling arbitration, Douglas petitioned for a writ of mandamus.

Analysis

Because a writ of mandamus is an extraordinary remedy, we have developed five factors that cabin our power to grant the writ:

1. "The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires."

2. "The petitioner will be damaged or prejudiced in a way not correctable on appeal."

3. "The district court's order is clearly erroneous as a matter of law."

4. "The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules."

5. "The district court's order raises new and important problems, or issues of law of first impression."

Bauman v. U.S. Dist. Court, 557 F.2d 650, 654-55 (9th Cir. 1977).

The third factor is a necessary condition for granting a writ of mandamus. *Executive Software N. Am., Inc. v. U.S. Dist. Court,* 24 F.3d 1545, 1551 (9th Cir. 1994). But "all five factors need not be satisfied at once." *Valenzuela-Gonzalez v. U.S. Dist. Court,* 915 F.2d 1276, 1279 (9th Cir. 1990). If the district court clearly erred, we determine whether the four additional factors "in the mandamus calculus point in favor of granting the writ." *Executive Software,* 24 F.3d at 1551.

1. Douglas alleges that Talk America changed his service contract without notifying him. He could only have become aware of the new terms if he had

visited Talk America's website and examined the contract for possible changes. The district court seems to have assumed Douglas had visited the website when it noted that the contract was available on "the web site on which Plaintiff paid his bills." However, Douglas claims that he authorized AOL to charge his credit card automatically and Talk America continued this practice, so he had no occasion to visit Talk America's website to pay his bills. Even if Douglas had visited the website, he would have had no reason to look at the contract posted there. Parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side.[1] Indeed, a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so. *Union Pac. R.R. v. Chi., Milwaukee, St. Paul & Pac. R.R.*, 549 F.2d 114, 118 (9th Cir. 1976). This is because a revised contract is merely an offer and does not bind the parties until it is accepted. *Matanuska Valley Farmers Cooperating Ass'n v. Monaghan*, 188 F.2d 906, 909 (9th Cir. 1951). And generally "an offeree cannot actually assent to an offer unless he

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[1] Nor would a party know *when* to check the website for possible changes to the contract terms without being notified that the contract has been changed and how. Douglas would have had to check the contract every day for possible changes. Without notice, an examination would be fairly cumbersome, as Douglas would have had to compare every word of the posted contract with his existing contract in order to detect whether it had changed.

knows of its existence." 1 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 4:13, at 365 (4th ed. 1990); *see also Trimble v. N.Y. Life Ins. Co.*, 255 N.Y.S. 292, 297 (App. Div. 1932) ("An offer may not be accepted until it is made and brought to the attention of the one accepting."). Even if Douglas's continued use of Talk America's service could be considered assent, such assent can only be inferred after he received proper notice of the proposed changes. Douglas claims that no such notice was given.

Crawford v. Talk America, Inc., No. 05-CV-0180-DRH, 2005 WL 2465909, at *4 (S.D. Ill. Oct. 6, 2005), and *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1103-06 (C.D. Cal. 2002), on which the district court relied, are not to the contrary. The customers in these cases received notice of the modified contract by mail. The service provider in *Bischoff* mailed the contract to the customer, 180 F. Supp. 2d at 1101, and the service provider in *Crawford* gave notice to the customer that she could see the contract terms online or call the service provider to learn of the terms. 2005 WL 2465909, at *3 n.3. Furthermore, *Crawford* and *Bischoff* involved new customers who necessarily would be on notice that they were required to assent to contract terms as a predicate for using the service. By contrast, the California Court of Appeal has held that a *revised* contract containing an arbitration clause is unenforceable against existing customers, even when they are given notice by mail. *Badie v. Bank of Am.*, 67 Cal.App.4th 779, 801 (Ct. App. 1998).

The district court thus erred in holding that Douglas was bound by the terms of the revised contract when he was not notified of the changes. The error reflects fundamental misapplications of contract law and goes to the heart of petitioner's claim. It would alone be sufficient to satisfy the third *Bauman* factor, but the district court also committed two additional errors. Even if Douglas were bound by the new terms of the contract (which he is not for the reasons already explained), the new terms probably would not be enforceable in California because they conflict with California's fundamental policy as to unconscionable contracts.[2] In New York, as in California, a contract is

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[2] Under the Federal Arbitration Act (FAA), 9 U.S.C. § 2, "[a]rbitration agreements ... are subject to all defenses to enforcement that apply to contracts generally." *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003). Thus, "[t]o evaluate the validity of an arbitration agreement, federal courts 'should apply ordinary state-law principles that govern the formation of contracts.'" *Id.* (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). Such state-law principles come from the law of a particular state – not federal general common law under the FAA. *See First Options*, 514 U.S. at 944. Here, Douglas has raised the state law defenses of lack of contract formation and unconscionability, so we must determine which state's law applies.

The FAA "does not create any independent federal-question jurisdiction." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). The district court exercised supplemental jurisdiction in this case. When a federal court exercises supplemental jurisdiction, "the federal court applies the choice-of-law rules of the forum state," which in this case is California. *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1164 (9th Cir. 1996).

(Continued on following page)

unconscionable only if it is both procedurally and substantively unconscionable. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000); *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10 (1988). That's where the similarities end. The district court erred in analyzing California law as to both procedural and substantive unconscionability.

The district court held that the arbitration clause in the modified contract is not procedurally unconscionable (and therefore enforceable) because Douglas had meaningful alternative choices for telephone service. Under New York law this choice forecloses any procedural unconscionability claim. *See Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448, 449 (App. Div.

Under California's choice-of-law rules, the district court may not enforce the choice-of-law provision pointing to New York law if (1) New York's substantive law is contrary to a fundamental policy entrenched in California's substantive law and (2) California has a "materially greater interest" than New York in determining the issue. *Wash. Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906, 916-17 (2001) (quoting Restatement (Second) of Conflict of Laws § 187(2)). To determine which state has the materially greater interest, we look to the domicile of the parties and the place of the wrong. *See Reich v. Purcell*, 67 Cal. 2d 551, 555 (1967). California certainly has an interest in protecting the thousands of citizens in the California subclass of this class action from unconscionable contracts. And this interest is materially greater than New York's interest because Talk America is a Pennsylvania corporation with its principal place of business in Pennsylvania. Therefore, if New York law conflicts with a fundamental policy of California, the choice-of-law provision cannot be enforced and California law would apply.

2003). However, after the district court made its ruling, we noted that California "has rejected the notion that the availability ... of substitute ... services *alone* can defeat a claim of procedural unconscionability." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1283 (9th Cir. 2006) (en banc). In California, a contract can be procedurally unconscionable if a service provider has overwhelming bargaining power and presents a "take-it-or-leave-it" contract to a customer – even if the customer has a meaningful choice as to service providers. *Id.* at 1284.

Likewise, the district court held that the class action waiver provision is not substantively unconscionable. Such waivers aren't substantively unconscionable under New York law. *See Hayes v. County Bank*, 811 N.Y.S.2d 741, 743 (App. Div. 2006); *Tsadilas v. Providian Nat'l Bank,* 786 N.Y.S.2d 478, 480 (App. Div. 2004); *Ranieri,* 759 N.Y.S.2d at 449. The district court cited *Provencher v. Dell, Inc.,* 409 F. Supp. 2d 1196, 1201 (C.D. Cal. 2006), for the proposition that California law was in accord, but the California Court of Appeal in *Cohen v. DirecTV, Inc.*, 142 Cal. App. 4th 1442, 1455 n.13 (Ct. App. 2006), expressly disavowed *Provencher.* A class action waiver provision thus may be unconscionable in California. Whether it is depends on the facts and circumstances developed during the course of litigation. The district court clearly erred in holding that the clauses (assuming that they are part of the contract at all) are consistent with California policy and therefore enforceable as a matter of law.

Because we find that the district court committed clear errors of law, we turn to the remaining four *Bauman* factors.

2. The first and second *Bauman* factors weigh in favor of granting mandamus relief.[3] If Douglas is forced to arbitrate, he "has no other adequate means" of ensuring that he can continue as the class representative. *Bauman*, 557 F.2d at 654. This would "prejudice[]" Douglas "in a way not correctable on appeal." *Id.*

If Douglas wins the arbitration and is awarded all the damages he asks for, then his individual claim would be rendered moot.[4] Douglas couldn't avoid mootness by moving to vacate the arbitration award solely because he wanted to continue as the class representative. There are only four permissible grounds for vacating an arbitration award: (1) "the award was procured by corruption, fraud, or undue means"; (2) "there was evident partiality or corruption in the arbitrators"; (3) the arbitrators "refus[ed]

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[3] We generally examine the first and second factors together. *See Bauman*, 557 F.2d at 654 (the second factor "is closely related to the first").

[4] If Douglas were to lose the arbitration or were awarded less than he seeks, his claim would not be moot, as he would be able to challenge the district court's order compelling arbitration as part of his appeal of the arbitration award. *See Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 960 (9th Cir. 2007) (reversing a district court's order compelling arbitration when the plaintiff received an arbitration award on a restitution claim but "[t]he arbitrator found for [defendant] on [plaintiff's] other claims").

to postpone the hearing" even when there was sufficient cause to postpone, "refus[ed] to hear evidence pertinent and material to the controversy" or engaged in "other misbehavior"; and (4) "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a). In sum, a party needs to show "affirmative misconduct" or "irrational[ity]" in the arbitration to vacate an arbitration award. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003) (en banc). Losing the opportunity to continue as a class representative doesn't come close to meeting this standard.

If Douglas's individual claim is rendered moot because it is fully satisfied as a result of the arbitration, he would lose his status as class representative because he would no longer have a concrete stake in the controversy. It is also doubtful that he could appeal the district court's order confirming an award that fully satisfied his individual claim, and he would thus have no opportunity to challenge the district court's order compelling the arbitration in the first place. It is thus entirely possible that the district court's clear error in compelling arbitration would be insulated from appellate review. *Bauman*, 557 F.2d at 654.

3. The fifth *Bauman* factor also favors mandamus relief. The district court's order enforcing new contractual terms when a customer is only given notice of the terms by having the contract posted on the internet "raises new and important problems" and addresses "issues of law of first impression."

Bauman, 557 F.2d at 655. This is the first time any federal court of appeals has considered whether to enforce a modified contract with a customer where the customer claims that the only notice of the changed terms consisted of posting the revised contract on the provider's website. This issue is also of some significance, as it potentially affects the relationship of numerous service providers with millions of customers, and thus deserves immediate resolution.

* * *

Because four of the five *Bauman* factors favor mandamus relief, and only one factor (the fourth) militates against it, we conclude that the balance of factors favors issuing the writ. The district court's order compelling arbitration is vacated.

PETITION GRANTED.

Counsel

David R. Greifinger, The Law Offices of David R. Greifinger, Santa Monica, CA; J. Paul Gignac, Katherine Donoven and Lisa Johnston Nicholes, Arias, Ozzello & Gignac, LLP, Santa Barbara, CA; Howard Andrew Goldstein, Law Offices of Howard A. Goldstein, Van Nuys, CA, for petitioner.

Paul F. Donsbach and Jennifer L. Andrews, Kutak Rock LLP, Irvine, CA; Bartholomew L. McLeay, Jeremy Fitzpatrick and Paul R. Gwilt, Kutak Rock LLP, Omaha, NE, for real party in interest.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JOE DOUGLAS, on behalf of himself and all others similarly situated, --- JOE DOUGLAS, on behalf of himself and on behalf of all others similarly situated, Petitioner, V. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent, TALK AMERICA INC., a Pennsylvania corporation, Real Party in Interest.	No. 06-75424 D.C. No. CV-06-03809-GAF **JUDGMENT**

Petition for a Writ of Mandamus to the
United States District Court for the
Central District of California

TO: The Honorable Gary A. Feess

The Court has GRANTED the petition for Writ of Mandamus filed by petitioner. Now, therefore, you are directed to take such actions as is consistent with the opinion of the Court filed on July 18, 2007.

FOR THE COURT

Cathy A. Catterson

By: /s/ Eliza Lau
Eliza Lau
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JOE DOUGLAS.

JOE DOUGLAS, on behalf of himself and on behalf of all others similarly situated,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

TALK AMERICA INC., a Pennsylvania corporation,

Real Party in Interest.

No. 06-75424

D.C. No. CV-06-03809-GAF Central District of California, Los Angeles

ORDER

(Filed May 29, 2007)

Before: KOZINSKI, GOULD and CALLAHAN, Circuit Judges.

This petition for a writ of mandamus raises issues that warrant oral argument. The Clerk shall calendar oral argument for this petition in Pasadena, California on June 7, 2007 at 3:00 p.m. This panel retains jurisdiction over this petition.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 06-3809 GAF (RCx)

Date October 20, 2006

Title Douglas v. Talk America Inc.

Present: The Honorable **GARY ALLEN FEESS**

Marilynn Morris	None	N/A
Deputy Clerk	Court Reporter/Recorder	Tape No.

Attorneys Present for Plaintiffs:
None

Attorneys Present for Defendants:
None

Proceedings: (In Chambers)

ORDER RE: MOTION TO COMPEL ARBITRATION AND STAY ACTION

A. BACKGROUND AND MOTION

Plaintiff Joe Douglas, who contracted with America Online ("AOL") in 1998 for long distance telephone services, became a customer of Defendant Talk America Inc. ("Talk America") in about 2001 when Talk America took over AOL's long distance accounts. Until about 2005, as a customer of Talk America, he received and paid for long distance telephone service. However, he contends that he discovered in 2005 that he was being charged a number of fees that allegedly

were never, or not adequately, disclosed to him. Having become aware of those charges, he then filed this lawsuit for unfair and deceptive business practices, which he brings on his own behalf and as a purported class representative of all persons who were customers of Talk America for the past two years, and a subclass of California residents who were billed for such charges over the past four years. Plaintiff's operative First Amended Complaint ("FAC") asserts claims for violation of the Federal Communications Act, breach of contract, and violation of related California consumer protection statutes.

Talk America now moves under Federal Rule of Civil Procedure ("Rule") 12(b)(1) for dismissal for lack of subject matter jurisdiction, or, in the alternative, to compel arbitration and stay the present action.[1] Talk America contends that Plaintiff's agreement with Talk America contains an arbitration clause that waives his right to pursue claims on behalf of a class

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[1] Though the Ninth Circuit has yet to rule definitively on this issue, district courts have held that motions to compel arbitration may appropriately be styled as motions to dismiss for lack of subject matter jurisdiction. *See Araiza v. Nat'l Steel & Shipbuilding Co.*, 973 F. Supp. 963, 964 (C.D. Cal. 1997) (defendants filed a 12(b)(1) motion to compel arbitration pursuant to collective bargaining agreement); *see also DeGroff v. MascoTech Forming Techs. Fort Wayne, Inc.*, 179 F. Supp. 2d 896, 899 n.2 (N.D. Ind. 2001) ("motion to compel arbitration could also be considered under [Rule] 12(b)(1)"). Lacking clear guidance from the circuit, the Court treats the motion as one to compel arbitration under 9 U.S.C. § 4.

and requires him to pursue his claims in arbitration. Plaintiff argues that he never received a copy of the agreement containing the clause, and that, even if he had received the agreement, the arbitration clause should not be enforced because it is unconscionable. For the reasons discussed below, the motion is **GRANTED**.

B. Issues Presented

The present motion raises three[2] issues for resolution:

1. Whether an agreement containing an arbitration clause can be enforced if the party resisting arbitration was not presented with a written copy of the agreement containing the arbitration clause.

2. Assuming that the arbitration clause is otherwise enforceable, whether the arbitration clause should be construed under California or New York law.

3. Whether, under the applicable state law, the arbitration clause is unconscionable and therefore unenforceable.

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[2] Although technically the first question is whether the arbitration clause would encompass the present dispute, the parties do not dispute its applicability if it is otherwise enforceable. The Court therefore does not discuss that question.

C. Discussion

1. The Federal Arbitration Act

The Federal Arbitration Act ("FAA") governs arbitration agreements in contracts involving interstate commerce and holds that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA further provides that "[a] party aggravated by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." *Id.* § 4. The court should then "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." *Id.* § 3.

When determining whether to compel a party to arbitrate a dispute, a district court may not review the merits of the dispute, but instead must limit its inquiry to: (1) whether a valid agreement to arbitrate exists, and, if it does, (2) whether the agreement encompasses the dispute at issue. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

2. Plaintiff Is Bound by the Consumer Services Agreement

Plaintiff acknowledges the existence of an agreement with Talk America in his FAC where he

alleges that "[o]n or before July 18, 2005, Plaintiff and Talk America entered into a written telephone service contract." (FAC ¶ 37.) Indeed, he could hardly dispute its existence since he received services for which he paid Talk America over a period of approximately four years. Plaintiff further acknowledges that Talk America's Consumer Services Agreement ("CSA") specifies that "BY ENROLLING IN, USING, OR PAYING FOR THE SERVICES, YOU AGREE TO THE PRICES, CHARGES, TERMS AND CONDITIONS IN THIS AGREEMENT." (Opp. at 5; Herbenick Decl., Ex. A [CSA] at 1.) Among other things, the CSA contains a clause, entitled "Dispute Resolution," which states:

> THIS SECTION PROVIDES FOR RESOLUTION OF DISPUTES THROUGH FINAL AND BINDING ARBITRATION BEFORE A NEUTRAL ARBITRATOR INSTEAD OF IN A COURT BY A JUDGE OR JURY OR THROUGH A CLASS ACTION. YOU CONTINUE TO HAVE CERTAIN RIGHTS TO OBTAIN RELIEF FROM A FEDERAL OR STATE REGULATORY AGENCY.

(Herbenick Decl., Ex. A [CSA] at 4.) In addition, the CSA provides a class action waiver provision: "NO DISPUTE MAY BE JOINED WITH ANOTHER LAWSUIT, OR IN AN ARBITRATION WITH A DISPUTE OF ANY OTHER PERSON, OR RESOLVED ON A CLASS-WIDE BASIS." (*Id.* at 5.) Finally, the CSA contains a choice of law provision, in which "[t]his Agreement will be governed by the law of the

State of New York, without regard to its choice of law rules." (*Id.* at 6.)

Despite asserting alleged contract rights against Talk America, Plaintiff contends that he should not be bound by the CSA since he never received a written copy of the document. However, Talk America notes that the web site on which Plaintiff paid his bills contained a link to the CSA, which Plaintiff could have accessed at any time between February 2004 and September 2005. Cases that have addressed this issue in similar circumstances have held that the customer's use of Talk America's long distance service constitutes acceptance of the terms of the CSA. *Crawford v. Talk America, Inc.*, No. 05-CV-0180-DRH, 2005 WL 2465909 (S.D. Ill. Oct. 5, 2005); *see also Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1105 (C.D. Cal. 2002) ("Competent adults are bound by such documents, read or unread.").

The Court is presented with a similar situation in this case. Douglas contracted for long distance telephone services and knew that Talk America had undertaken the obligation to provide those services in 2001. Talk America in fact delivered long distance services to Douglas for approximately four years, and Douglas regularly paid for those services. Talk America provided internet access to the CSA, which Douglas could have read had he wanted to know the terms and conditions under which he was receiving services. Accordingly, the Court concludes that Douglas is bound by the CSA's terms and conditions.

3. New York Law Applies

Where a federal court exercises supplemental jurisdiction over state claims, it will apply the choice of law rules of the forum state. *MRO Commc'ns, Inc. v. Am. Tel. & Tel. Co.*, 197 F.3d 1276, 1282 (1999). Under California law, "the court must first determine: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law." *Wash. Mut. Bank v. Super. Ct.*, 24 Cal. 4th 906, 916 (2001). If neither of these tests are met, that ends the inquiry, and the court applies the forum state's law. *Id.* If either test is met, however, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. *Id.* If there is no conflict, the court shall enforce the parties' choice of law provision. *Id.* However, if there is a conflict, the court is to determine whether California has a "materially greater interest" than the chosen state in the determination of the issue, *id.*, in which case California law applies.

i. New York Has a Substantial Relationship to Talk America

A substantial relationship between the chosen state and the parties or their transaction can be found where: (1) a party to the choice-of-law clause is incorporated or has its principal place of business in the chosen state, *Discover Bank v. Super. Ct.*, 134 Cal. App. 4th 886, 891-92 (Ct. App. 2005); (2) where the contract is to be performed in the chosen state or a

party in the dispute resides in that state, *ABF Capitol Corp. v. Berglass,* 130 Cal. App. 4th 825, 835 (2005); or (3) in the state where the contract was executed, *First Pa. Bank, N.A. v. Lugli,* 542 F. Supp. 73, 75 (N.D. Cal. 1982).

Here, Talk America establishes a substantial relationship by asserting that "Talk America had approximately 11,000 local and long distance customer lines in . . . New York." (Callahan Decl. ¶ 5.) Though it is unknown whether this number is a large or small percentage of its nationwide customer base, having 11,000 customers in the state alone establishes that its presence in New York is not de minimis. In addition, one of its four switches that route and connect customer calls is located in New York, while none is located in California. (*Id.* ¶ 6.) A switch helps Talk America perform its end of the contract with its customers by providing telephone service, which means that New York has a substantial relationship to Talk America.

ii. New York Law Does Not Violate Fundamental Policy of California

The relevant fundamental policies here involve arbitration, arbitration agreements, unconscionability, and class action waiver provisions, none of which vary significantly between New York and California. First, both states recognize a strong public policy favoring arbitration. *Broughton v. Cigna Healthplans,*

21 Cal. 4th 1066, 1095 (1999); *Ranieri v. Bell Atlantic Mobile,* 759 N.Y.S.2d 448, 448 (N.Y. App. Div. 2003).

Second, both New York and California courts recognize that arbitration agreements are "valid, irrevocable, and unenforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Discover Bank v. Super. Ct.,* 36 Cal. 4th 148, 163 (2005) (citing 9 U.S.C. § 2); *see Hayes v. County Bank,* 811 N.Y.S.2d 741, 743 (N.Y. App. Div. 2006) (same). Both New York and California law also recognize that "a state court may refuse to enforce an arbitration agreement based on generally applicable contract defenses, such as fraud, duress, or unconscionability." *Discover Bank,* 36 Cal. 4th at 165; *Brower v. Gateway 2000, Inc.,* 676 N.Y.S.2d 569, 573 (N.Y. App. Div. 1998).

Third, New York and California law have similar approaches to unconscionability defenses. In each state, unconscionability requires a showing that the contract was both procedurally and substantively unconscionable when made. *Discover Bank,* 36 Cal. 4th at 160; *Brower,* 676 N.Y.S.2d at 573. Both states also recognize that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required" for unenforceability. *Armendariz v. Found. Health Psychcare Serv., Inc.,* 24 Cal. 4th 83, 114 (2000); *see Brower,* 676 N.Y.S.2d at 574 ("the substantive element alone may be sufficient to render the terms of the provision at issue unenforceable"). Both focus on the same two factors for procedural unconscionability: oppression and surprise.

Laster v. T-Mobile USA, Inc., 407 F. Supp. 2d 1181, 1187 (S.D. Cal. 2005); *Brower*, 676 N.Y.S.2d at 572-73.

Finally, as to class action waiver provisions, New York courts have consistently held that they are not unconscionable and do not violate public policy. *Ranieri*, 759 N.Y.S.2d at 449; *Tsadilas v. Providian Nat'l Bank*, 786 N.Y.S.2d 478, 480 (N.Y. App. Div. 2004). And though *Discover Bank* outlines a test to determine whether a class action provision is unconscionable, it specifically stated that it "[did] not hold all class action waivers [to be] necessarily unconscionable." 36 Cal. 4th at 162; *see also Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1201 (C.D. Cal. 2006) ("In *Discover Bank*, the California Supreme Court made it clear that there is ***no blanket policy*** in California against class action waivers in the consumer context.") (emphasis added).

Thus, because New York law does not conflict with California's fundamental policy regarding arbitration agreements and class action waiver provisions, New York law applies here.

4. Under New York Law, the Arbitration Clause Is Not Unconscionable

"[G]eneral contract defenses such as fraud, duress, or unconscionability, grounded in state contract law, may operate to invalidate arbitration agreements." *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002) (citation omitted). Due to the CSA's choice of law provision, New York law

applies to determine whether the arbitration clause is unconscionable.

Under New York law, both procedural and substantive unconscionability are required to demonstrate that the arbitration agreement is unconscionable. *Brower,* 676 N.Y.S.2d at 573. In other words, there must be "some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.* (citation and internal quotation marks omitted).

a. Procedural Unconscionability

Procedural unconscionability is present when one party "lacked any meaningful choice in entering into the contract, taking into consideration such factors as the setting of the transaction, the experience and education of the party claiming unconscionability, whether the contract contained 'fine print,' whether the seller used 'high-pressured tactics' and any disparity in the parties' bargaining power." *Id.* (citation omitted).

Here, Talk America was not the only provider of long distance telephone services available to Plaintiff, who had the option to cancel service at any time and sign up with another provider. *See Ranieri,* 759 N.Y.S.2d at 449 (arbitration provision not unconscionable "without offering evidence that he could not have chosen another service provider"). Though Talk America has greater bargaining power than Plaintiff,

that factor "alone does not invalidate a contract . . . when the purchase can be made elsewhere." *Id.* In addition, the CSA itself was only seven pages, and the arbitration clause was typed in the same font size as the rest of the CSA, with portions in caps and bold to ensure that the reader was aware of this provision. In no way could the arbitration agreement be construed as "hidden or tucked away within a complex document of inordinate length." *Brower,* 676 N.Y.S.2d at 573. Thus, because Plaintiff did not "lack any meaningful choice" in entering into the agreement, the arbitration clause is not procedurally unconscionable.

b. Substantive Unconscionability

Here, the only challenge to the substance of the arbitration agreement or the CSA is the class waiver provision. As such, the Court bases its analysis solely on whether the class waiver provision is substantively unconscionable.

Substantive unconscionability is present when "the terms unreasonably favor one party." *Id.* at 574. New York courts have consistently held that contractual waivers of class action rights within arbitration agreements are neither unconscionable nor violative of public policy. *Ranieri,* 759 N.Y.S.2d at 449; *Tsadilas,* 786 N.Y.S.2d at 480. New York courts have specifically noted that "[t]he arbitration provision is enforceable even though it waives plaintiff's right to bring a class action." *Tsadilas,* 786 N.Y.S.2d at 480.

Here, the arbitration clause's class action waiver provision is accepted under New York law. The "fact that the arbitration agreement[] effectively preclude[s] [Plaintiff] from pursuing a class action does not alone render [it] substantively unconscionable." *Hayes*, 811 N.Y.S.2d at 743. Thus, under New York law, the arbitration agreement is enforceable because it is not unconscionable.

D. CONCLUSION

In sum, because Plaintiff is bound by the CSA and the arbitration clause is enforceable under New York law, the Court **GRANTS** Defendant Talk America's motion to compel arbitration and stay action.

IT IS SO ORDERED.

Initials of
Preparer /s/ [Illegible]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE DOUGLAS, on behalf of himself and on behalf of all others similarly situated, Petitioner, v. **UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,** Respondent, **TALK AMERICA INC., a Pennsylvania corporation,** Real Party in Interest.	No. 06-75424 D.C. No. CV-06-03809-GAF Central District of California, Los Angeles **ORDER** (Filed Aug. 29, 2007)

Before: **KOZINSKI**, **GOULD** and **CALLAHAN**, Circuit Judges.

Talk America's motion to recall the mandate is denied as unnecessary. *See Ellis* v. *U.S. Dist. Court*, 360 F.3d 1022, 1023 (9th Cir. 2004) (en banc). The petition for rehearing en banc is denied. *See* Fed. R. App. P. 35.

Federal Arbitration Act, 9 U.S.C. § 2-4, 16

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in

the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

* * *

(a) An appeal may be taken from

(1) an order

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292 (b) of title 28, an appeal may not be taken from an interlocutory order

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.